(7)

No. 85-1921

Supreme Court, U.S.
FILED
JUN 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DIANE L. MAURIELLO,

Petitioner,

vs.

THE UNIVERSITY OF MEDICINE AND DENISTRY OF NEW JERSEY, THE GRADUATE SCHOOL OF BIOMEDICAL SCIENCES, GIAMPIERO di MAYORCA, M.D., individually and as Chairperson of the Department of Microbiology, RODNEY ROTHSTEIN, Ph.D., individually and as Chairperson of the Graduate Committee of the Department of Microbiology, VILMA K. JANSONS, Ph.D., jointly and severally,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Counterstatement of the Case

Petitioner, Diane L. Mauriello, was accepted as a student in the doctoral program in microbiology at the respondent University in 1977 (Pa11).* A requirement for the awarding of the Ph.D. degree is the completion and defense of a research dissertation thesis by the student (Pa12). The research necessary for the thesis is conducted by the student in the laboratory of a faculty advisor selected by the student (Pa11 to Pa12). The advisor provides a student with laboratory facilities, funding and guidance and is responsible for evaluating a student's progress (Pa12).

Mauriello completed her course requirements in 1979 and selected Dr. Vilma Jansons as her faculty advisor (Pa11). As required by the Graduate School, Mauriello presented a thesis proposal to Dr. Jansons in 1980 (Pa12). The proposal, however, was not acceptable and revisions were required. Mauriello did not submit a revised proposal until twenty months later (Pa12).

While Dr. Jansons found serious weaknesses in Mauriello's work between 1979 and 1981, she allowed Mauriello to continue because her mother was very ill at the time. Moreover, because of Mauriello's poor background in biochemistry, Dr. Jansons found it difficult to decide if Mauriello would eventually overcome her weaknesses (Ja542 to 543, Ja548).** In 1982, some of Mauriello's research was incorporated in scientific papers which had

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* Pa refers to petitioner's appendix.

** Ja refers to the Joint Appendix filed with the United States Court of Appeals for the Third Circuit in appeal numbers 84-5666 and 84-5720.

been submitted for publication (Pa12). The rejection of the articles led Dr. Jansons to reevaluate Mauriello's work (Pa12). Upon doing so, Jansons found several serious errors in the reported results of experiments conducted by Mauriello and significant errors in the manner in which she conducted research (Ja551-10, Ja193, Ja550-8, Ja552-10 to Ja557-4, Ja653-7 to 17, Ja756-3 to 13). The severity of these errors led Dr. Jansons to advise Mauriello that she would withdraw as her faculty advisor and could no longer sponsor her research (Pa12). Following discussion with Mauriello, Jansons agreed to give her another chance and Mauriello returned to the laboratory on a probationary basis (Pa12). In November, 1982, however Mauriello accepted full-time employment with an outside corporation and limited her work in the laboratory to, at best, a part-time basis (Pa12 to Pa13).

At the end of November, 1982 Jansons sent a note to Mauriello expressing dissatisfaction with her work (Pa13). Inquiring about the status of the corrections of the research errors Mauriello was supposed to have made, Dr. Jansons wrote "[w]here is the change that you said took place this autumn in you and according to you made you worthy of defending a Ph.D. thesis? It was, perhaps, different for some weeks after you were put on probation, now it's business as usual—total irresponsibility" (Pa13). In this note, Jansons also advised Mauriello that the corrections were needed by a certain date in order to complete a presentation that was to be given on December 2, 1982 (Pa13). On November 26, 1982 Jansons and Mauriello met in Jansons' office at which time Mauriello did not have the corrections, told Jansons that she did not need the corrections and offered other excuses for not having completed the work. After listening to Mauriello,

Jansons informed her that she would no longer sponsor her research (Ja569-8 to Ja571-5, Ja192).

In a memorandum dated December 15, 1982 Jansons informed Dr. Rothstein, Chairman of the Department's Graduate Committee, that she would not sponsor Mauriello's research after January 1, 1983 and further advised Dr. Rothstein that Mauriello had "assured me that her performance would improve and, if not, she would withdraw from the graduate school. There has not been any improvement" (Pa13). It is uncontradicted that a graduate student at this stage of the doctoral program cannot continue in the program without a faculty advisor and that Mauriello was aware of this requirement. It is also uncontradicted that Mauriello took no steps at this time to secure another facutly advisor and that no committee or individual at the University has the authority to compel a faculty member to serve as an advisor (Ja691-23, Ja355-24 to Ja356-1, Ja360-20 to 361-1, Ja698-11, Ja650-17 to 651-7, Ja705-25, Ja702-16).

Instead of seeking another faculty advisor, Mauriello approached the chairman of the department's Graduate Committee, Dr. Rothstein, concerning her situation with Dr. Jansons (Pa13). The Graduate Committee serves as an advisory body to the Chairman of the Department but does not have the authority to appoint a faculty advisor (Ja698-12). Dr. Rothstein was given the impression by Mauriello that she was almost finished with her thesis. He agreed to convene the Committee in January, 1983 in an effort to mediate the dispute and, according to his testimony, advised Mauriello to bring data to the committee meeting to corroborate her statement that her thesis was almost finished (Ja695-18 to Ja696-22). The precise in-

structions given to Mauriello as to what material she was to present at the meeting are disputed with Mauriello testifying that she was told to bring only data on the research errors she claimed had been corrected and on extraneous non-thesis research she had done in Jansons' laboratory (Pa13).

It is undisputed that Mauriello was not prepared to give a presentation of her thesis at the January meeting and that the Committee agreed to convene again on February 2, 1983 for the presentation (Pa13). It is further undisputed that the Committee then met with Dr. Jansons who described the nature of the errors committed by Mauriello and that, following this meeting, a tentative decision to dismiss plaintiff from the program was made, pending her presentation before the Committee on February 2, 1983 (Pa14).

It is further undisputed that Mauriello appeared at the February 2, 1983 meeting unprepared to give the thesis presentation expected by the Committee (Pa14). Again, she testified that she had not been instructed to do so but rather to present non-thesis research she had accomplished. Since she did not have the requested material, the committee scheduled a third meeting (Pa14). Several days later, Mauriello admittedly contacted the chairman of the Department, Dr. di Mayorca, and told him that she would be unable to make the presentation because Jansons possessed much of her material (Pa14). Dr. Jansons, however, denied having any of Mauriello's material (Ja546-10 to 18). More importantly, it was inconceivable to Dr. di Mayorca that Mauriello did not have her data since graduate students normally possess several copies of data from experiments they conduct and it is always

the student's responsibility to maintain their research notebook (Pa14). Dr. di Mayorca advised the committee members that Mauriello was unable to produce the requested material and a majority of the Committee adopted the previously tentative decision to dismiss (Pa14). On February 14, 1983 Dr. Rothstein, on behalf of the Committee, advised Mauriello that the Committee had notified the graduate school that she was no longer a Ph.D. candidate in the Department of Microbiology (Pa14).

On June 9, 1983 Mauriello instituted suit in the Federal District Court of New Jersey pursuant to 42 *U.S.C.* § 1983 asserting that her procedural and substantive due process rights had been violated. Following a jury verdict in Mauriello's favor, the district court judge entered an order on August 28, 1984 which, *inter alia,* directed the parties to agree on selection of an ad hoc committee to review Mauriello's thesis research material (Pa15). While the matter was pending before the United States Court of Appeals for the Third Circuit, Mauriello made her presentation to the Ad Hoc Committee. After reviewing the material and her presentation, the Ad Hoc Committee rendered its unanimous decision on October 9, 1985 that Mauriello's research was "not of (*sic*) good scientific quality and Ph.D. caliber" (Pa15).

In reversing the judgment in favor of petitioner, the Circuit Court held that it was error to submit the case to the jury because petitioner's proof was insufficient to survive respondents' motion for a directed verdict (Pa19). Viewing all the facts in the light most favorable to petitioner, the court concluded that "under the applicable law the plaintiff failed to present sufficient evidence to establish a claim" and accordingly the Circuit Court ordered

judgment entered in favor of defendants (Pa19 to Pa20, Pa23).

Summary of Argument

The writ sought herein should be denied because petitioner has failed to demonstrate that the decision of the United States Court of Appeals for the Third Circuit conflicts with any principles enunciated by this Court in *Board of Curators, Univ. of Mo.* v. *Horowitz*, 435 U.S. 78 (1978) and *Regents of University of Michigan* v. *Ewing*, —— U.S. ——, 106 S.Ct. 507 (1985). Rather, in deciding that Mauriello's rights had not been violated, the Circuit Court properly interpreted and applied the law governing due process requirements in academic dismissals of students. Contrary to petitioner's contentions, the Circuit Court did not improperly invade the province of the jury but instead properly held that Mauriello did not present sufficient evidence upon which a jury verdict in her favor could be sustained when the correct legal principles were applied and that the trial judge had erred in "unduly equat[ing] procedural due process in this case to the more traditional trial type proceeding" (Pa21). Since the decision below is entirely consistent with two recent rulings of this Court, no basis exists for granting review of the writ of certiorari.

ARGUMENT

The Writ should be denied because the decision of the United States Court of Appeals for the Third Circuit is fully consistent with this Court's recent decisions on the requirements of due process in academic dismissals.

In two recent cases, this Court has addressed the issue of due process requirements in the academic dismissal of a student from a state university's graduate program. *Regents of the University of Michigan* v. *Ewing (Ewing), supra; Board of Curators, Univ. of Mo.* v. *Horowitz (Horowitz), supra.* In both cases, the Court found it unnecessary to decide whether students in such instances have interests subject to the protections of the due process clause. *Ewing, supra,* 106 S.Ct. at 513; *Horowitz, supra,* 435 U.S. at 84. Rather, in both cases, the Court "assum[ed] the existence of a constitutionally protectible . . . right" and held that under the applicable standards the students had demonstrated no violation of those assumed rights. *Ewing, supra,* 106 S.Ct. at 513; *Horowitz, supra,* 435 U.S. at 84-85. This is precisely the manner in which the Circuit Court decided the instant appeal. Indeed, the opinion below expressly notes that the lower court was "following the lead of the Supreme Court" (Pa22). It requires only a brief analysis to demonstrate that the Circuit Court correctly interpreted and applied the *Horowitz* and *Ewing* decisions to the instant case and that, therefore, no justification exists for granting the writ.

Mauriello contends that her procedural due process rights were violated by the manner in which she was dismissed from the program. In *Horowitz,* the majority of

this Court rejected the argument that the constitution required a hearing in the case of an academic dismissal. 435 U.S. at 90-91. Since "(t)he educational process is not by nature adversary" and a hearing may be "useless or harmless in finding out the truth as to scholarship" the majority held "that dismissals for academic (as opposed to disciplinary) cause do not necessitate a hearing before the school's decisionmaking body." 435 U.S. at 87, 90 (quoting *Barnard* v. *Inhabitants of Shelburne*, 216 Mass. 19, 23, 102 N.E. 1095, 1097 (1913)).

Despite the clear holding in *Horowitz*, petitioner contends that in order to satisfy procedural due process, the administrative body which dismissed her, i.e. the Graduate Committee, must have academically evaluated her and that the evaluation by Dr. Jansons was insufficient to satisfy constitutional requirements. Firstly, requiring evaluation by the decisionmaking body is just another way of saying a hearing, formal or informal, must be held before that body, a requirement rejected in *Horowitz*. In a case such as this where only the faculty advisor and the student interact on the thesis research, evaluation by the Graduate Committee would of necessity require some type of hearing or presentation to that body.

Assuming *arguendo*, however, that petitioner's contention is well-taken, the record is abundantly clear that she was afforded such evaluation by the Graduate Committee. It is undisputed that petitioner appeared twice before the Committee and on both occasions was unprepared to give a thesis presentation and then advised the chairman that she could not do so since Dr. Jansons allegedly had her material. It is also undisputed that graduate students have the responsibility for maintaining their re-

search notes. Regardless of the reason for her unpreparedness on the first two occasions, the import of the fact that she failed to maintain proper records as expected of a graduate student at her level was an academic evaluation conducted by the Graduate Committee.

In *Horowitz,* the majority held that procedural due process in academic dismissals requires only that the student be informed of the faculty's dissatisfaction with her progress and the danger that this poses to continued enrollment. 435 U.S. at 85. The undisputed evidence is that Jansons had informed Mauriello of her dissatisfaction, had given her a probationary period to improve, had advised her in November, 1982 that she was withdrawing as her advisor and that Mauriello knew she could not continue in the program without an advisor. Based on this undisputed evidence, the jury could not have found a procedural due process violation had it been properly instructed on the applicable law. Contrary to petitioner's argument, *Horowitz* does not require that these steps actually be taken by the decisionmaking body. *See* 435 U.S. at 86-87. The charge by the trial judge, however, "unduly equated procedural due process in this case to the more traditional trial type proceeding" (Pa21). Instead of improperly invading the province of the jury as contended by petitioner, the Circuit Court corrected the error of the trial judge and determined based on undisputed evidence that petitioner had not advanced sufficient proof to take the issue to the jury.

Petitioner's contention that the Circuit Court improperly decided the issue of a substantive due process violation is similarly lacking in merit. Petitioner does not contend that the Circuit Court applied an erroneous legal

standard to the substantive due process issue. Rather, she contends that this Court's guidance is needed on a question of proof—i.e.—"how one proves if an academic decision was 'genuine' or not" (Petition at page 6). This issue, however, does not merit granting the writ to review the case since this Court has already set forth the standard of proof in *Ewing*. In such cases, the plaintiff must prove that the decision is "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." 106 S.Ct. at 513.

Petitioner further contends that the Circuit Court's decision impermissably restricts a jury from deciding whether a decision was genuinely academic or pretextual in any case where the school merely presents evaluations of the student. This contention, however, misconstrues the Circuit Court's decision. Contrary to petitioner's suggestion, the opinion below does not say that there can be no violation shown merely if defendants introduce evaluations into the record. Rather, the lower court, after reviewing all the evidence submitted by plaintiff in the light most favorable to her, held that "the evidence does not permit a finding that the plaintiff's dismissal was for reasons other than the quality of her academic performance" (Pa19, Pa22). Thus, the Circuit Court found no support in the record for petitioner's contention that the decision to dismiss her was not a genuinely academic decision. Petitioner's attempts to point out "conflicting evidence" in the record which she contends is sufficient to make this a jury question are equally unconvincing. The main thrust of her argument seems to be that it was for the jury to decide whether this was a *bona fide* academic decision because she submitted proof that the Graduate

Committee never evaluated her academic work, that Dr. Jansons who did evaluate it did not dismiss her, and that the Graduate Committee did not consider Janson's evaluation because, after hearing the evaluation, the Committee considered finding a new advisor for her (Petition at pages 7 to 8). Firstly, under *Ewing* and *Horowitz* it is irrelevant whether it was the Committee or Dr. Jansons who evaluated petitioner's work. As stated in *Ewing*, plaintiff must show that the "*person* or committee responsible did not actually exercise professional judgment," 106 S.Ct. at 513 (emphasis added), and pursuant to *Horowitz* that judgment need not be reviewed by the decisionmaking body in order to satisfy due process requirements. 435 U.S. at 87. Secondly, the mere fact that the Committee may have considered another option before making its final decision proves absolutely nothing about the nature of its decision. Thirdly, petitioner contradicts her own argument by contending, on the one hand, that the Committee did not evaluate her work and, on the other hand, that the Committee heard Jansons' evaluation of her work.

Petitioner also argues that testimony she submitted showing she was dismissed because she did not have a faculty advisor and had not presented evidence of research sufficient to form the basis of a thesis justified having a jury decide whether her dismissal was "genuinely" academic. It is difficult to conceive, however, how this evidence would help to prove a non-academic decision had been made. She did not have an advisor because her advisor uncontrovertedly withdrew because of dissatisfaction with her work. Whether her research was sufficient to form the basis of a thesis is so clearly an academic judgment that further response is unnecessary.

Petitioner seems to suggest that since she presented evidence to dispute these reasons for her dismissal it was sufficient to make out a jury question as to whether the stated reasons were pretextual. The disputes which she raises, however, do not contradict the stated reasons for dismissal. Whether or not she met with the Committee to find a new advisor or whether or not she was stopped before presenting her data to the Committee is irrelevant to the issue of whether her dismissal involved an academic decision. At best, these disputed issues are relevant only to petitioner's claims of entitlement to a hearing before the Committee before dismissal.

Finally, petitioner's contention that it was uncontested at trial that the Committee never evaluated her performance or her academic record is erroneous. The only uncontested fact was that the Committee never evaluated Mauriello's thesis work since it was never presented to them. The Committee, however, was presented with Jansons' evaluation of Mauriello's work and did evaluate the import of her failure to maintain proper records of her research. Such considerations are clearly within the proper ambit of academic decisionmaking. See *Ewing*, 106 S.Ct. at 514.

While it is evident from the above discussion that Mauriello has failed to adduce any evidence that the decision to dismiss her was not a genuine academic decision under any standard of proof, it should be noted that the standard which she applies in her argument is not applicable to the instant matter. Petitioner contends that the very minimal *prima facie* standard applicable in employment discrimination cases should also apply to cases in which students challenge their academic dismissals

(Petition at page 9). See *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981). However, this Court has never applied that standard to student academic dismissals. Indeed, applying that very minimal standard is directly contrary to this Court's admonition in *Ewing* that "[c]onsiderations of profound importance counsel restrained judicial review of the substance of academic decisions." 106 S.Ct. at 513.

The fault in this case is not with the Circuit Court's opinion. Rather, the fault lies with the lack of any relevant evidence submitted by petitioner which could support a jury verdict of a substantive due process violation. As the court below correctly held, petitioner failed to adduce any evidence upon which a jury could properly find that the decision to dismiss her was "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Ewing, supra,* 106 S.Ct. at 513.

Finally, even if it can be argued that petitioner's contentions have any merit, it would not justify plenary review by this Court. The opinion of the Third Circuit Court of Appeals is clearly a correct interpretation of the governing law as enunciated by this Court. The very most that could be argued by petitioner is that the lower court improperly interpreted and applied the facts of this particular case. Such a contention, however, does not constitute a "special and important reason" for granting the writ, *Sup. Ct. R.* 17, particularly given the subsequent Ad Hoc Committee finding that petitioner's work was "not of good scientific quality and Ph.D. caliber" (Pa15).

CONCLUSION

For the above stated reasons, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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Dated: June 19, 1986